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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6501

DATE COMPLAINT FILED: October 5, 2011

DATE OF NOTIFICATION: October 13, 2011

DATE OF LAST RESPONSE: November 28, 2011

DATE ACTIVATED: January 10, 2012

EXPIRATION OF SOL: April 1, 2016

COMPLAINANT:

Matthew Teter, Executive Director
Missouri Democratic State Committee

RESPONDENTS:

John Brunner
Brunner for Senate and Larry Legrand in
his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(2)
2 U.S.C. § 431(8)
2 U.S.C. § 431(9)
2 U.S.C. § 432(e)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
11 C.F.R. § 100.72
11 C.F.R. § 100.131
11 C.F.R. § 101.1(a)
11 C.F.R. § 101.3
11 C.F.R. § 102.1(a)
11 C.F.R. § 104.1(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that John Brunner, a candidate for the United States Senate in Missouri in 2012, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), when he triggered candidate reporting requirements between April and September 2011 but

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1 failed to timely file a Statement of Candidacy or designate his principal campaign committee.
2 The Complaint further alleges that Brunner's principal campaign committee failed to timely file
3 a Statement of Organization and to timely disclose its receipts and disbursements. Respondents
4 deny the allegations and claim that Brunner was engaged in permissible "testing the waters"
5 activities between April and September 2011, and did not become a federal candidate prior to
6 registering with the Commission on October 3, 2011. The first disclosure report filed by
7 Brunner's principal campaign committee, Brunner for Senate and Larry Legrand in his official
8 capacity as treasurer (the "Committee"), was the 2011 Year-End Report, which included
9 receipts and disbursements for the earlier "testing the waters" period dating back to May 2011.

10 Based on the available information, it appears that Brunner engaged in "testing the
11 waters" between April and September 2011 and was not required to register and report as a
12 candidate prior to October 3, 2011. We therefore recommend that the Commission find no
13 reason to believe that Brunner violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a), and no
14 reason to believe that the Committee violated 2 U.S.C. §§ 433(a) and 434(a)(2), and 11 C.F.R.
15 §§ 102.1(a) and 104.1(a).

16 II. FACTUAL AND LEGAL ANALYSIS

17 A. Factual Summary

18 On October 3, 2011, Brunner announced his candidacy for the Senate. On the same
19 date, he filed a Statement of Candidacy with the Commission designating the Committee as his
20 principal campaign committee. The Committee concurrently filed its Statement of Organization
21 with the Commission and designated Larry Legrand as its treasurer. The Committee filed its
22 first disclosure report, the 2011 Year-End Report, on January 31, 2012.

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1 The Complaint alleges that Brunner became a federal candidate earlier than October 3,
2 2011, but delayed announcing his candidacy to avoid disclosing his campaign activities. *See*
3 Compl. at 2-4 (Oct. 5, 2011). As the basis for the allegation, Complainant asserts that media
4 accounts reported that between April and September 2011, Brunner traveled throughout
5 Missouri promoting his candidacy, hired a prominent Missouri political consultant, traveled to
6 Washington, D.C. to confer with national Republican Party officials, and "repeatedly declared
7 his intent to use his large personal fortune to fund his campaign." *See* Compl. at 2.

8 Complainant cites the following statements as evidence that Brunner was a candidate
9 prior to October 3, 2011:

- 10 • In April, Brunner reportedly said that he was "very serious" about running for the Senate
11 and said, "If I believe in myself, I'd make a contribution and hope that others feel the
12 same way." David A. Lieb, *St. Louis businessman might challenge McCaskill in Senate*
13 *race*, ASSOC. PRESS, Apr. 19, 2011.¹
14
- 15 • In May, Brunner's consultant, John Hancock, reportedly said about Brunner's
16 prospective opponent: "Todd Akin is a politician, been in elected office for 23 years. I
17 would say that if they want an experienced politician to be a U.S. Senator, they've got
18 plenty of choices." David Catanese, *Akin's in, but MOGOP still without a frontrunner*,
19 POLITICO, May 17, 2011.
20
- 21 • In July, Brunner attended an event in Springfield, MO, at which he reportedly said that
22 he was ready to "jump right in" to the race. Transcript, John Brunner on Missouri U.S.
23 Senate Race. POLITICMO, July 23, 2011.²
24
- 25 • In August, "sources close to Brunner" reportedly said that Brunner's formal
26 announcement was "imminent." Cameron Joseph, *Another Republican preparing to*
27 *challenge Sen. McCaskill*, THE HILL, Aug. 10, 2011.

¹ The Complaint indicates that this article is available at
<http://www.columbiatribune.com/news/2011/apr/20/st-louis-businessman-considers-senate-run/>. The article
available at that link, however, while similar to the attachment to the complaint, is titled "St. Louis businessman
considers Senate run" and is not attributed to the Associated Press.

² The Complaint also cites to this media source for the assertion that Brunner "without recorded dissent, []
was introduced as a candidate for U.S. Senate at the Target BBQ in Springfield." Compl. at 2. But, that article
does not mention a barbeque. Another article in the same exhibit to the Complaint mentions a barbeque, but does
not report that Brunner was introduced as a candidate. *See* Compl. Ex. D, Eli Yokley, *Brunner 'ready' to jump in*
Senate race, POLITICMO, July 24, 2011.

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- In August, Brunner reportedly suggested that he would make a "sizeable" contribution to his campaign, stating: "We're not going to run out of gas on this campaign." Jake Wagman, *Germ-X chairman may get into U.S. Senate race*, ST. LOUIS POST-DISPATCH, Aug. 15, 2011.
- In September, Hancock reportedly replied to a reporter's inquiry as to whether Brunner was "definitely running" by stating: "I wouldn't be talking to you if he wasn't." Steve Kraske, *The name that scares Missouri Democrats is Brunner... John Brunner*, KANSAS CITY STAR, Sep. 2, 2011.

Compl. at 2-4.

Respondents contend that all of Brunner's activities between April and September 2011 – including travel, use of advisors, planning, and preparation – were appropriate and permissible "testing the waters" activities and did not trigger the requirement to file a Statement of Candidacy.³ Respondents also assert that neither the characterization of the cited statements, nor the statements themselves, suggest that Brunner had decided to become a candidate before October 3, 2011. *See Resp. at 5-7.* Respondents maintain that the cited statements were ambiguous and conditional as to Brunner's candidacy. *Id.*

B. Legal Analysis

I. Legal Standards Applicable in "Testing the Waters" Matters

An individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual meets the \$5,000 threshold, he or she has fifteen days to designate a principal

³ According to the Response, which predated the Committee's first disclosure report, "all pre-candidacy financial activity" would be disclosed in the Committee's first report. *See Resp. at 2* (Nov. 30, 2011). Respondents also stated that Brunner did not engage in any fundraising prior to announcing his candidacy and paid all his "testing the waters" expenses using personal funds. *Id.* In its 2011 Year-End Report, the Committee disclosed a lump sum receipt and a corresponding disbursement on October 1, 2011, reflecting Brunner's in-kind contribution of \$335,614.84 to pay for "Testing the Waters 5/18/11-9/30/11 Polling/Media Consulting/Travel/Strategic Consulting/Int." On March 29, 2012, the Commission's Reports Analysis Division ("RAD") sent the Committee a Request for Additional Information ("RFAI") requesting an itemization of these pre-candidacy "testing the waters" expenses. On April 20, 2012, the Committee amended its 2011 Year-End Report in response to the RFAI to itemize the "testing the waters" expenditures.

1 campaign committee by filing a Statement of Candidacy. 2 U.S.C. § 432(e)(1); 11 C.F.R.
2 § 101.1(a). The principal campaign committee must then file a Statement of Organization
3 within ten days of its designation, *see* 2 U.S.C. § 433(a), and must file disclosure reports with
4 the Commission in accordance with 2 U.S.C. § 434(a) and (b).

5 The Commission has established limited exemptions from these thresholds, which
6 permit an individual to test the feasibility of a campaign for federal office without becoming a
7 candidate under the Act. Commonly referred to as the "testing the waters" exemptions,
8 11 C.F.R. §§ 100.72 and 100.131, respectively, exclude from the definitions of "contribution"
9 and "expenditure" those funds received, and payments made, solely to determine whether an
10 individual should become a candidate.⁴ *See* 2 U.S.C. § 431(8), (9). "Testing the waters"
11 activities include, but are not limited to, payments for polling, telephone calls, and travel.
12 11 C.F.R. §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register
13 or file disclosure reports with the Commission unless and until the individual subsequently
14 decides to run for federal office or conducts activities that indicate he or she has decided to
15 become a candidate. *See id.*; *see also* Advisory Op. 1979-26 (Grassley). All funds raised and
16 spent for "testing the waters" activities are, however, subject to the Act's limitations and
17 prohibitions. 11 C.F.R. §§ 100.72(a), 100.131(a).

18 Once an individual begins to campaign or decides to become a candidate, funds that
19 were raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a
20 candidate. 11 C.F.R. §§ 100.72(a), 100.131(a). Certain activities may indicate that the

⁴ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .").

1 individual has decided to become a candidate and is no longer "testing the waters." In that case,
2 once the individual has raised or spent more than \$5,000, he or she must register as a candidate.
3 Commission regulations set out a non-exhaustive list of activities that indicate that an individual
4 has decided to become a candidate. An individual indicates that he or she has gone beyond
5 "testing the waters" and has decided to become a candidate, for example, by: (1) using general
6 public political advertising to publicize his or her intention to campaign for federal office;
7 (2) raising funds in excess of what could reasonably be expected to be used for exploratory
8 activities or undertaking activity designed to amass campaign funds that would be spent after he
9 or she becomes a candidate; (3) making or authorizing written or oral statements that refer to
10 him or her as a candidate for a particular office; (4) conducting activities in close proximity to
11 the election or over a protracted period of time; or (5) taking action to qualify for the ballot
12 under state law. 11 C.F.R. §§ 100.72(b), 100.131(b). These regulations seek to draw a
13 distinction between activities directed to an evaluation of the feasibility of one's candidacy, as
14 distinguished from conduct signifying that a decision to become a candidate has been made.
15 See Advisory Op. 1981-32 (Askew).

16 2. Brunner's "Testing the Waters" Statements and Activities

17 The core issue in this matter is whether Brunner made or authorized statements that refer
18 to him as a candidate or engaged in activities that indicate that he had decided to become a
19 candidate for U.S. Senate prior to registering with the Commission on October 3, 2011. See
20 11 C.F.R. §§ 100.72(b)(3); 100.131(b)(3). As discussed below, it does not appear that any of
21 the statements or activities identified in the Complaint establishes that Brunner was or had
22 decided to become a candidate at the time he made the statements.

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1 Brunner's reported statements that he was "very serious," "ready to jump right in," and
2 prepared to finance a potential campaign from his personal funds do not establish that he had
3 decided to become a candidate. *See* Statement of Reasons, Comm'rs Petersen, Hunter, McGahn
4 & Weintraub at 2, MUR 5934 (Thompson) (ambiguous statements do not establish candidacy).
5 Each of the articles in which these statements are reported notes, in some form, that Brunner
6 had not yet announced that he would run. For example, after Brunner's statement to a reporter
7 that he was ready to "jump right in," the interviewer asked, "What's going to seal the deal?"
8 indicating that he did not view Brunner as having just said that he definitely decided to be a
9 candidate. Transcript, John Brunner on Missouri U.S. Senate Race, POLITICMO (July 23, 2011)
10 at 1. In responding to the interviewer's question about when he expected to launch a campaign,
11 Brunner replied "Very soon," *see id.*, indicating that Brunner had not yet made a definite
12 decision to run. *See* Factual & Legal Analysis at 8, MUR 6472 (Gooch) (indefinite statement
13 does not establish candidacy). Additionally, Brunner's casual reference to a "campaign" –
14 when indefinitely stating "We're not going to run out of gas on this campaign" – by itself is not
15 sufficient to establish candidacy. *See* Factual & Legal Analysis at 8, n.3, MUR 6472 (Gooch)
16 (concluding that, in context, the designation "goochcampaign" on a website of an organization
17 related to a potential candidate was not a sufficient indicia of candidacy).

18 Closer to the line is Hancock's reported response to a reporter's inquiry as to whether
19 Brunner was running, that "I wouldn't be talking to you if he wasn't." Kraske, *supra* p. 3.
20 Respondents dispute that Hancock's statement was in response to the direct question presented
21 in the article and dispute that the statement should be imputed to Brunner, asserting that "the
22 decision to run for office was Mr. Brunner's to make, not Mr. Hancock's." *See* Resp. at 7. We
23 have discovered no evidence that Brunner authorized the statement. Under the Commission's

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1 regulations, only statements made or authorized by the potential candidate may indicate that the
2 individual is no longer "testing the waters." *See* 11 C.F.R. §§ 100.72(b)(3); 100.131(b)(3).

3 Similarly, there is no evidence that Brunner authorized other alleged statements by third
4 parties, such as the alleged statement from "sources close to Brunner" predicting (inaccurately)
5 that a formal declaration of candidacy is "imminent." And, like the statements discussed above,
6 this statement is also not a definite statement of candidacy. Likewise, the allegation that
7 Brunner was introduced by a third person as a "candidate" at a barbeque in July 2011 "without
8 recorded dissent," is not supported by the purported source and, if it were, does not establish
9 that Brunner himself had decided to become a candidate without some evidence that Brunner
10 authorized the introduction.

11 Finally, the alleged statement by Hancock concerning one of Brunner's potential
12 opponents also is insufficient to establish that Brunner had decided to become candidate. *See*
13 Factual & Legal Analysis at 8-10, MUR 6430 (Daines) (criticism of potential opponent does not
14 necessarily establish candidacy); First Gen. Counsel's Rpt. at 14-16; Commission Certification
15 dated October 27, 2006, MUR 5661 (Butler) (concluding that brochure critiquing incumbent
16 during "testing the waters" period does not establish candidacy).

17 Just as the statements do not establish Brunner's candidacy, neither the amount spent on
18 nor the duration of Brunner's reported activities between April and September 2011 establish
19 that Brunner had gone beyond the "testing the waters" phase. In other matters, the Commission
20 has found that receipts and disbursements roughly equivalent to — or even greater than —
21 Brunner's \$335,614.84 did not exceed what could reasonably be expected to finance
22 exploratory activities. *See, e.g.,* MUR 6224 (Fiorina) (\$600,000); MUR 2710 (Sloane)
23 (\$200,000); MUR 5930 (Schuring) (\$194,000); *see also* MUR 5934 (Thompson) (over \$9.52

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1 million in receipts for presidential candidate preparing for possible national campaign). Further,
2 the Commission also has found that activities of a duration longer than five to six months were
3 within the testing the waters boundaries. *See* MUR 5983 (Roberson) (no reason to believe
4 regarding exploratory activities over six months).

5 As to Brunner's other reported activities, the Commission's regulations specifically
6 permit travel to determine the viability of a potential candidacy as part of "testing the waters."
7 *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). The Commission has concluded that having
8 discussions with political consultants to determine the viability of a potential candidacy is
9 within the "testing the waters" exemption. *See* Factual & Legal Analysis at 6, MUR 6196
10 (Kennedy) ("F&LA"); Eric Nelson Roberson F&LA at 3, 6, MUR 5983. The fact that Brunner
11 hired a consultant should not be treated differently in this matter. Additionally, taking steps to
12 organize a potential campaign does not constitute a decision to be a candidate. *See* Statement of
13 Reasons, Comm'rs Petersen, Hunter, McGahn & Weintraub at 3, MUR 5934 (Thompson)
14 ("SOR") (signing a long-term lease for campaign headquarters); SOR, Comm'rs Petersen,
15 Hunter, McGahn & Weintraub at 2, MUR 5930 (Schuring) (conditional statement that it is
16 important to have a campaign organization in place if the incumbent retires).

17 For all of these reasons, the available information demonstrates that Brunner was
18 "testing the waters" between April and September 2011 and that Respondents timely registered
19 and reported to the Commission. Accordingly, we recommend that the Commission find no
20 reason to believe that Brunner violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and that
21 the Committee violated 2 U.S.C. §§ 433(a) and 434(a)(2), and 11 C.F.R. §§ 102.1(a) and
22 104.1(a).

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III. RECOMMENDATIONS

1. Find no reason to believe that John Brunner violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a);
2. Find no reason to believe that Brunner for Senate and Larry Legrand in his official capacity as treasurer violated 2 U.S.C. §§ 433(a) and 434(a)(2), and 11 C.F.R. §§ 102.1(a) and 104.1(a);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and
5. Close the file.

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel
for Enforcement

Date

11-9-12

Kathleen Guith
Deputy Associate General Counsel
for Enforcement

Mark Shcnkwiler
Assistant General Counsel

Kamau Philbert
Attorney

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